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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-628

JAMES G. MOORE and JUDSON E. TOMLIN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JAMES G. MOORE and JUDSON E. TOMLIN,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, JAMES G. MOORE and JUDSON E. TOMLIN, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding of July 20, 1972.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. No opinion was rendered by the District Court for the Southern District of Alabama.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 20, 1968. A timely petition for rehearing *en banc* was denied on September 5, 1972, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the opinion and judgment of the Court of Appeals for the Fifth Circuit, reversing a jury verdict in favor of petitioners on a contested issue of material fact and remanding the cause with instructions to enter judgment notwithstanding the verdict in favor of the Government, operated to deprive petitioners of their right to a trial by jury guaranteed them by the Seventh Amendment to the United States Constitution.

2. Whether the standard applied by the Court of Appeals for the Fifth Circuit in determining the sufficiency of the evidence necessary to require submission of the case to the jury as announced in *Boeing* v. *Shipman*, 411 F. 2d 365 (1969) is erroneous, in that it conflicts with the decision of this Court in *Lavender* v. *Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1945) and with the Seventh Amendment to the United States Constitution.

3. Whether the opinion and judgment of the Court of Appeals for the Fifth Circuit is in irreconcilable conflict with the opinion and judgment of another panel of that Court announced July 14, 1972, in case of *U. S.* v. *R.*

F. McCullough. This opinion, while not yet reported, is reproduced as Appendix B.

4. Whether the opinion and judgment of the Court of Appeals for the Fifth Circuit, insofar as it finds and holds that a showing that a person held office in a taxpayer corporation, however tenuously and with however little actual authority over corporate funds, is *conclusive* of his status as a "responsible person" under 26 U.S.C. Section 6672, and that no amount of evidence of that person's lack of actual authority will suffice to rebut such a *conclusive* presumption.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VII, United States Constitution:

[Trial by Jury in Civil Cases]

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

United States Code, Title 26:

Sec. 6672:

"Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by

law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable."

Sec. 6671(b):

"Person defined. - - - The term 'person', as used in this subchapter, includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

STATEMENT OF THE CASE

This case consolidated separate suits by petitioners for sums paid by them representing withholding taxes allegedly due from employees of Jetco Contracting Co., Inc. In January, 1966, a certificate of incorporation for Jetco Contracting Co., Inc. was filed in the Probate Court of Mobile County, Alabama, showing petitioners Moore and Tomlin as President and Vice-President, respectively, and as owners of 25% and 20% of the capital stock, respectively. A third incorporator, H. B. Branch, was shown to be Secretary-Treasurer of the corporation and the owner of 55% of its stock.

As the opinion of the Fifth Circuit correctly points out, no stock was ever issued, no by-laws were ever adopted, there were no meetings of directors and none of the partnership assets were ever transferred to the corporation. It is important to emphasize that petitioner Moore was never a partner in the business prior to January, 1966, and petitioner Tomlin was only a minority part-

ner while H. B. Branch, both before incorporating and after, owned more than 50% of the business.

Both petitioners signed checks on Jetco accounts. When, in May, 1966, Jetco began having financial difficulties, the prime contractor on the NASA project at Bay St. Louis, Mississippi, on which Jetco was a sub-contractor, began advancing funds to Jetco to meet payrolls and suppliers charges using a "no-balance" account at the Hancock Bank. Checks drawn on this account had to be countersigned by a representative of Blount Bros. and by petitioner Tomlin. Moore was not authorized to sign checks on this account. When the time came for Jetco to pay its quarterly withholding tax for the second quarter of 1966, Blount refused to advance funds to cover this payment. Jetco continued to work as a sub-contractor for Blount and Blount continued to advance funds to meet payrolls and suppliers charges but steadfastly refused to pay the withholding taxes on the ground that such payments were not covered by Jetco's performance bond.

After the penalties under 26 U.S.C. 6672 had been assessed, petitioners instituted suit to recover payments which they had made. In addition to their own testimony, petitioners offered the testimony of Jetco's former office manager, its former bookkeeper, its accountant, the two bankers who handled loans to Jetco, and the widow of H. B. Branch, all of whom testified that Branch, a strong and forceful personality, exercised complete control over the financial affairs of Jetco, did all the bank borrowing, and made all decisions concerning who should be paid by Jetco, in what amounts, and at what times, even to the extent of designating the bank account on which checks should be written, and that Branch shared this control with no one.

The deposition of Frederick J. Plaza, Blount's project manager on the NASA job was introduced to show the relationship of Blount and Jetco and to show how the "no-balance" account operated.

The Government put on no testimony, and simply introduced into evidence a number of cancelled checks drawn on Jetco accounts and signed by petitioners during the two tax periods in question and a mortgage on a piece of Jetco equipment signed by petitioner Moore as President.

The District Court denied the Government's motion for a directed verdict at the conclusion of the evidence and submitted the case to the jury on the narrow question of whether either petitioner had sufficient control over Jetco's funds to constitute him a "responsible person" within the meaning of 26 U.S.C. 6672. The jury returned a verdict in favor of both petitioners. The Government filed a motion for a new trial, or in the alternative, for judgment notwithstanding the verdict, which motion was denied. The judgment of the District Court was reversed by the Court of Appeals for the Fifth Circuit and the case remanded for entry of a judgment notwithstanding the verdict.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The Decision Below Conflicts with Prior Decisions of This Court and with the Seventh Amendment to the United States Constitution.

Questions one and two posed by petitioners are so closely related that they are dealt with together. Did the

Court of Appeals for the Fifth Circuit deprive petitioners of their right to a trial by jury in contravention of the mandate of the Seventh Amendment to the United States Constitution? By its decision of July 20, 1972, the Fifth Circuit overturned the verdict of a jury in petitioners' favor and remanded the case to the District Court with directions to enter judgment notwithstanding the verdict in favor of the Government.

We submit that, although the Fifth Circuit did not say so expressly, it grounded its decision on the sufficiency of the evidence. There was no contention by the Government that there was any error of law in the conduct of the trial or in the instructions to the jury. The sole contention was that there was insufficient evidence to submit the case for the petitioners to the jury. The District Court disagreed, both in refusing the Government's motion for a directed verdict at the conclusion of the evidence, and in denying the Government's motion for a new trial or, in the alternative, a judgment notwithstanding the verdict, following the trial.

We submit that, under *any* standard yet expressed, petitioners were entitled to have a jury decide the fact question of whether they had sufficient control over the corporate assets of Jetco Contracting Co. to constitute them "responsible persons" under 26 U.S.C. 6672. After the question had been submitted to a jury and after the question had been resolved in petitioners' favor, a panel of the Fifth Circuit simply substituted its judgment for that of the jury.

It is impossible to tell from a reading of the Fifth Circuit's opinion what standard it applied in judging the sufficiency of the evidence, but we submit that it must be

presumed that the Court followed its own standard for *all* federal cases announced in its opinion in *Boeing* v. *Shipman*, 411 F. 2d 365 (1969).

While we contend that under *any* announced standard the decision of the Fifth Circuit is incorrect, we strongly challenge the decision in *Boeing* v. *Shipman*, supra, because this case is in direct conflict with both the ruling of this Court in *Lavender* v. *Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1945) and with the Seventh Amendment to the United States Constitution.

In *Boeing*, which was an F.E.L.A. case, the Fifth Circuit undertook to establish an evidentiary standard for submission of cases to juries in *all* federal cases. *Boeing* v. *Shipman*, supra, pp. 373-374.

There is little petitioners can add to the compelling dissent of Judge Rives in *Boeing*. *Boeing* is simply bad law which would allow lower Federal Courts to intrude into the very sanctuary of which they have been said by a Justice of this Court to be "primary custodians". *Galloway* v. *U. S.*, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458, dissenting opinion of Mr. Justice Black.

What is wrong with "the substantial evidence or reasonable man test"? Here is what Judge Rives said in his dissent in *Boeing*, supra, at pages 392-394:

> "Sitting en banc, a majority of this Court 'promulgate[s]' what it considers to be 'the standard' (emphasis added) for determining the sufficiency of evidence necessary to require submission of a case to the jury. For three reasons, I disagree with this newly promulgated formula.

First, the majority expressly overrules the Supreme Court's own sufficiency test set out in *Lavender* v. *Kurn*, supra, 327 U.S. at 653, 66 S. Ct. 740, and rejects *Planters Mfg. Co.* v. *Protection Mut. Ins. Co.*, 5 Cir. 1967, 380 F. 2d 869, 874, which adopted the Lavender standard. The majority, in so doing, commits constitutional error, for the Lavender test represents but one articulation of several constitutional formulas used by the Supreme Court.

Second, the majority simply has no authority to 'promulgate' any one standard when the Supreme Court itself has prescribed a number of them, and has left the door open for further formulas to be developed.

As has been mentioned, supra, pp. 389-390, perhaps the most concise and well accepted Supreme Court explanation of the standard is contained in *Brady* v. *Southern R. Co.*, 1943, 320 U.S. 476, 479-480, 64 S. Ct. 232, 88 L. Ed. 239. See 5 Moore, Federal Practice 50.02 [1], p. 2320 (2d Ed. 1968) (noting that 'the federal courts have been reasonably consistent in the application of the Brady rule.')

The wisdom of our forefathers embodied in the Seventh Amendment is expressed in a single sentence. Its limits are stated as 'the right of trial by jury' to be re-examined only 'according to the rules of the common law.' Many formulas have been used in the past and more will be employed in the future to explain the meaning of those phrases. No 'promulgation' of this Court can limit the freedom of thought and expression of the district judges, and it is sheer folly for us to make such an effort. I cannot help

wondering what this Court would do should some independent-minded district court judge choose to follow one of the Supreme Court statements of the standard instead of the standard announced by the majority. There is nothing we could do and we should never assume such an untenable position by adopting a single formula.

Third, I disagree with the new standard 'established' by the majority because it is at least misleading in its use of the term 'substantial,' if it is not erroneous. The word 'substantial' used in its legal sense, can equally well connote either a qualitative or a quantitative meaning. This distinction was implicitly recognized and effectively avoided by the decision in Planters. See 380 F.2d at 874. In closing, too, I note that, notwithstanding all the variations which the Supreme Court has played on its sufficiency theme, I have been unable to find a single instance in which the Supreme Court has used 'substantial' in any of its articulations of the consitutional standard."

Here is what this Court said in *Lavender* v. *Kurn*, supra, at pages 652-653:

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances

it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 68, 87 L. Ed. 610, 617, 618, 63 S. Ct. 444, 143 A.L.R. 967; Bailey v. Central Vermont R. Co., 319 U.S. 350, 353, 354, 87 L. Ed. 1444, 1447, 1448, 63 S. Ct. 1062; Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 35, 88 L. Ed. 520, 525, 64 S. Ct. 409, 15 NCCA(NS) 647. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73.

It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

What more can petitioners add but to say that *Boeing* . *Shipman* should be overruled, which would necessitate reversal of this case.

2. The Opinion and Judgment of the Court of Appeals for the Fifth Circuit in the Instant Case Is in Irreconcilable Conflict with the Opinion and Judgment of Another Panel of That Court Announced July 14, 1972, in U. S. v. McCullough, and Has Completely Misconceived the Law of Alabama with Respect to the Implied Powers of Corporate Officers under Alabama Law.

The opinion of the Fifth Circuit in *U. S.* v. *McCullough* which has not yet been reported is reproduced as Appendix B. In that case the jury found that the R. F. McCullough, although nominally president of the taxpayer corporation, was not a responsible person within the meaning of Section 6672, since the sole and dominating control of the corporation was in the hands of another. This Court upheld the jury's verdict saying, at page 3 of the slip opinion:

> "The government here contends for a position which would, in effect, change the language of Section 6672 from 'person required to collect, truthfully account for, and pay over' to 'person required to collect, truthfully account for, or pay over.' The government thus seeks to fix liability on R. F. McCullough because he was president of the corporation during a time when sufficient funds came into the corporation's coffers, which, in cumulative amount at least, would have been sufficient to discharge the corporation's liability for the unpaid taxes. The principal difficulty with this argument is that this is not the way the statute is written and there is no statutory authorization for the collection of this penalty, even though the taxpayer had free funds available for the purpose of paying the taxes."

We are unable to perceive any distinction between the question presented the jury in *McCullough* and that presented the jury in the instant case.

One possible interpretation of the ruling of this panel of the Fifth Circuit is that this case holds that a showing that a person held office in a taxpayer corporation, however tenuously and with however little actual authority over corporate funds, is *conclusive* of his status as a "responsible person" under 26 U.S.C. 6672, and that *no amount* of evidence of that person's lack of actual authority will suffice to rebut such a conclusive presumption.

Though the Government urged such an interpretation, no court has ever previously so held, and it is obvious that such a holding is in direct conflict with *McCullough*.

We submit that the Fifth Circuit misconceived the law of Alabama with respect to the implied powers of corporate officers under Alabama law.

The District Court correctly charged the jury that the president or vice president of an Alabama corporation has no greater power by virtue of his office than any other director of the company.

The "uncontradicted evidence" of Moore's and Tomlin's responsibility amounts to a showing that the certificate of incorporation designated them President and Vice-President, respectively, and that each of them signed checks for payrolls and accounts payable.

Since Jetco was admittedly an Alabama corporation, the relationships of its officers, directors and stockholders were manifestly governed by Alabama law. Against the contention that under Alabama law the President or Vice-President of a corporation has implied power over its

assets, the Supreme Court of Alabama, in *McMillan* v. *Dozier*, 257 Ala. 435, 411, 59 So. 2d 563, said:

> "A President of a corporation has no greater power by virtue of his office merely than any other director of the company, except that he is presiding officer of the meetings of the Board. The implied power of the presiding officer of the corporation is dependent upon the nature of the company's business and the measure of 'liability' to him by the Board of Directors. Sampson v. Fox, 109 Ala. 662, 19 So. 896; Clark v. Minge, 187 Ala. 97, 65 So. 832."

In *Sampson* v. *Fox*, 109 Ala. 662, 671, 19 So. 896, the Court amplified this principle saying:

> "Nor is there any foundation for the idea that it was the duty of Carr, as its president, to make payment of the debts of the Water Company. There is no evidence that such duty has been imposed, or authority had been conferred, by the Company; nor that either exists by general usage. In 1 Morawetz Corp. § 537, it is said: 'The implied powers of the president of a corporation depend upon the nature of the company's business, and the measure of the liability delegated to him by the board of directors. It seems that a president has no greater power, by virtue of his office merely, than any other director of the company, except that he is the presiding officer of the meetings of the board.' The Supreme Court of New Jersey said: 'In the absence of anything in the act of incorporation bestowing special power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies are within the

exclusive control of their boards of directors, from whom authority to dispose of their assets must be derived."

Finally, in *Clark* v. *Minge*, 187 Ala. 97, 101, 65 So. 832, the Court said of the respective duties of a Corporate President and Treasurer:

> "The Faunsdale Oil Mill has a treasurer. The treasurer of a corporation is the party to whom is committed the custody of its funds. While other officers or agents may have the power to collect money due the corporation and may also have the power to retain the custody of and pay out such funds, no such power impliedly belongs to a president of a corporation simply because he is president. The implied duty of the treasurer is, however, to receive and guard the funds of the corporation, and he is the party who possesses the implied power to collect debts due the corporation, of which he is the treasurer. In re Millward-Cliff Cracker Co.'s Estate, 161 Pa. 157, 28 Atl. 1072."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2755

JAMES G. MOORE,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

JUDSON E. TOMLIN,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Alabama

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(July 20, 1972)

Before RIVES, BELL and MORGAN,
Circuit Judges.

RIVES, Circuit Judge: Moore and Tomlin brought separate actions against the United States for the recovery of their partial payments of a penalty assessed against

each of them under section 6672 of the Internal Revenue Code of 1954, 26 U.S.C. § 6672.[1] The assessments were made against Moore and Tomlin, as responsible officers of Jetco Contracting Company, Inc., for willfully failing to collect, truthfully account for and pay over social security and withholding taxes in the total amount of $96,113.67 during the second and third quarters of 1966. The United States counterclaimed for the balance due.

The cases were consolidated for trial. The district court denied the Government's motion for a directed verdict against each defendant, and the jury returned verdicts for Moore and Tomlin and against the Government upon which the district court entered judgment. The sole issue is whether the judgment is erroneous as a matter of law; that is, whether the district court erred in refusing to grant the Government's motions for a directed verdict and for judgment notwithstanding the verdict separately against Moore and against Tomlin.

The issue may be further narrowed because the district court charged the jury:

> "Now, if you find in this case that Mr. Tomlin or Mr. Moore or both of them were persons required to collect, truthfully account for and pay over any tax imposed by the laws under consideration, then I charge you as a matter of law, and I direct you to find that it was done willfully, as I just described

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1. "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable."

it to you. The evidence is uncontradicted that it was done willfully. So the question directs really in the term that is being used here, and as the law uses the term 'responsible persons.' So you have got to determine whether or not Mr. Moore or Mr. Tomlin or both of them were responsible persons required to collect, truthfully account for and pay over any tax that we are talking about here."

(App. 240.) There is, and can be, no contention that the district court was incorrect in charging that, as a matter of law, Moore's and Tomlin's conduct was willful. Thus the narrow issue is whether Moore or Tomlin or both of them were responsible persons within the meaning of the Act.[2]

We find that the uncontradicted evidence establishes that both Moore and Tomlin were such responsible persons and, therefore, reverse with directions to enter judgment against them.

I.

The word "Jetco" was derived from the initials of Judson E. Tomlin Company, the name under which Tomlin began in June, 1963, to conduct his solely-owned unincorporated business. Branch and Moore joined the business as partners. In January of 1966 Branch, Moore and Tomlin filed in the office of the Judge of Probate of Mobile County, Alabama, a certificate of incorporation of

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2. "(b) *Person defined.*—The term 'person,' as used in this subchapter, includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

26 U.S.C. § 6671(b).

Jetco Contracting Company, Inc. (hereafter Jetco). The certificate authorized 1000 shares to be issued as follows: Branch, 550; Moore, 250; and Tomlin, 200. The certificate also shows that for the first year the three were chosen to be directors and to fill the following respective offices: Moore, President; Tomlin, Vice President; and Branch, Secretary-Treasurer. Thereafter, the business was conducted under the corporate name but there was practically no corporate formality—no issuance of certificates of stock, no corporate by-laws or minutes, and no written transfer of title to the partnership assets.

Such lack of formality does not seem material to the issues of this case because, under Alabama law,[3] the body corporate became complete upon the filing of the certificate of incorporation, and the corporation filed quarterly federal tax returns (Form 941) for the second and third quarters of 1966 (April 1, 1966, through September 30, 1966) but without any remittance of the taxes. Based on these returns Jetco's tax liabilities were assessed. Jetco made no payments with respect to the unpaid taxes. Branch died in December, 1967. In 1968 the assessments were made against Moore and Tomlin.[4]

Jetco maintained bank accounts with the American National Bank of Mobile and the First National Bank of Mobile. Moore, Tomlin and Branch were each singly em-

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3. Code of Alabama, Recompiled 1958, Title 10 § 21(11).

4. The assessments against Tomlin were for the full amount of the unpaid taxes, $95,736.83. Moore left Jetco midway through the period; hence, the assessments against him are for only $87,240.69. The Government stipulates in its brief:

> "Although the Government counterclaimed against both Moore and Tomlin, it is not attempting to collect the tax twice: it merely seeks a single amount equal to the unpaid withholding taxes."

powered to sign checks on the First National Bank, while Moore and Branch were so empowered at the American National Bank. Jetco and Blount Brothers Contracting Company, Inc. (Blount) opened a joint "no balance" account at the Hancock Bank of Bay St. Louis, Mississippi, for the purpose of paying the wages of Jetco employees working on a subcontract for Blount and for certain materials and supplies. Checks on this joint account required two signatures, that of Tomlin and that of Fred Plaga, Project Manager for Blount at the National Aeronautics and Space Administration test site in Hancock County. No funds were deposited in the "no balance" account until a check was presented for payment. Upon such payment the Hancock Bank would transfer sufficient funds from another Blount account to cover the presented check.

The district court charged the jury as to further undisputed evidence as follows:

> "The evidence before you is that the plaintiff Tomlin knew that the withheld taxes were not being paid over to the Government, and it's somewhat contradicted either in May or July of 1966. And Mr. Moore knew of it at least by July of 1966. The evidence before you is that after they became aware—that is, by direct evidence—after they became aware that taxes were not being withheld and paid, that they continued to sign checks for materials and other creditors rather than paying this. The evidence is uncontradicted that checks were signed paying themselves salaries without taxes being withheld. They were paid the gross amount."

(App. 237.)

Moore and Tomlin each continued to sign checks on Jetco's accounts for payroll and for creditors in amounts

substantially in excess of the taxes required to be withheld and paid to the Government. The quarterly Form 941, that was submitted for the second quarter of 1966 without payment, bore the signature of Moore as President of Jetco. A mortgage on Jetco property, that was given to secure advances from Blount for payroll and other expenses, was signed by Moore as President of Jetco "with full authority." Both Moore and Tomlin had authority to hire and fire employees. Both testified that there was never any formal delineation of duties at Jetco between the officers. Moore testified, however, that Branch made all of the decisions with respect to which bills should be paid and that he merely followed orders and instructions from Branch in signing his name to corporate checks. Prior to Jetco's incorporation, both Moore and Tomlin were familiar with withholding requirements and had made such payments for other taxpayers.

II.

An employer is required to withhold federal income and social security taxes from the wages of his employees.[5] The amount of the taxes so collected or withheld constitutes a special fund in trust for the United States.[6] Each employee is credited by the Government with the taxes withheld from his salary.[7] When a corporation fails to pay the taxes which it is required to withhold, section 6672[8] makes it possible for the Government to collect its tax moneys from the responsible officers of the corporation.

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5. 26 U.S.C.A. §§ 3102 and 3402.

6. 26 U.S.C.A. § 7501.

7. Newsome v. United States, 5 Cir. 1970, 431 F.2d 742; Dillard v. Patterson, 5 Cir. 1963, 326 F.2d 502.

8. Quoted in footnote 1, *supra*.

The penalty imposed by section 6672 is distinct from and not in substitution of the liability for taxes owed by the employer. Nonetheless, as stated in *Newsome, supra,*

> "Section 6672's 'basic purpose is the protection of governmental revenue. * * * It provides a remedy to prevent the unnecessary loss of tax funds by permitting the "taxing authority to reach those responsible for the corporation's failure to pay the taxes which are owing." Monday v. United States, 421 F.2d 1210, 1216 (7 Cir. 1970), and cases cited therein."

431 F.2d at 745.

Section 6672 has not been strictly construed as is the usual rule with penalty statutes, but has been broadly and liberally construed to fulfill the purposes for which it was intended, particularly in determining who are "responsible persons" within the coverage of the statute.[9] Indeed the definition of "person" in section 6671(b)[10] expressly covers any officer who "is under a duty to perform the act in respect of which the violation occurs."

In this case, violations occurred at every stage of Moore's and Tomlin's continuing duty "to collect, truthfully account for and pay over the tax." Sec. 6672. Tomlin willfully failed to collect the tax from employees working on the subcontract for Blount. Moore and Tomlin willfully failed to truthfully account for the taxes.[11] Finally,

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9. See cases collected in Annotation, 22 A.L.R. 3d. pp. 8, 49, § 4[a].

10. Quoted in footnote 2, *supra.*

11. "* * * he subjects himself to liability under 6672 when he voluntarily and consciously 'risks' the withheld taxes in the operation of the corporation, and subsequently the corporation is unable to remit the withheld taxes."

Newsome v. United States, *supra,* 431 F.2d at 746.

both Moore and Tomlin willfully failed to pay over the taxes.[12]

The judgment is reversed and the case is remanded with directions to grant the Government's motion for judgment notwithstanding the verdict.[13]

REVERSED AND REMANDED WITH DIRECTIONS.

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12. As majority members of Jetco's board of directors, they had ultimate authority over the expenditure of funds. Cf. United States v. Byrum, 1972, ... U.S. ..... [decided June 26, 1972] slip opinion at pages 12 & 13. Each had and exercised singly authority to sign checks on Jetco's accounts. Each is responsible for the dissipation of the special fund which the corporation held in trust for the United States. Section 7501; *Newsome, supra*, 431 F.2d at 745.

13. The plaintiffs-appellees have not contested the authority of the court to grant the Government's motions for directed verdict and for judgment notwithstanding the verdict. Section 6671 designates this liability as a penalty but provides that it "shall be assessed and collected in the same manner as taxes." We think it settled that the liability "is statutory and in such cases the statutory limitations are controlling." Bloom v. United States, 9 Cir. 1959, 272 F.2d 215, 221, followed in United States v. Molitor, 9 Cir. 1964, 337 F.2d 917, 924. See also United States v. McMullen, 2 Cir. 1958, 262 F.2d 499, 500.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2755

D. C. Docket No. CA 5349 & 5353-69

JAMES G. MOORE,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

JUDSON E. TOMLIN,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Alabama

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Before RIVES, BELL and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to grant the Government's motion for judgment notwithstanding the verdict, in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

July 20, 1972

Issued as Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2755

JAMES G. MOORE,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

JUDSON E. TOMLIN,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Alabama

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion July 20, 1972, 5 Cir., 1972, ... F.2d .....).

(September 5, 1972)

Before RIVES, BELL and MORGAN,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1104

R. F. McCULLOUGH,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Alabama

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(July 14, 1972)

Before TUTTLE, COLEMAN and CLARK,
Circuit Judges.

PER CURIAM: This is the second appearance of this case in this court. The first appeal was from a directed verdict in favor of the taxpayer in a suit for refund filed by him to recover what amounted to $165,318.20 of unpaid and withheld employees' withholding and F.I.C.A. taxes of McCullough Industries for the periods ending December 31, 1963, March 31, 1964 and June 30, 1964. The government had assessed the taxes by applying a penalty equal to the amount of taxes under Section 6672 of the Internal Revenue Code of 1954, which provides that:

> "Any person required to collect, truthfully account for, and pay over any tax imposed by this Title who wilfully fails to collect such tax or truthfully account for and pay over such tax, or wilfully attempts in any manner to evade or defeat any such tax or the payment thereof . . . ."

shall be liable for the 100% provided under the statute.

Since such person is, of course, not the primary taxpayer a collection of the 100% penalty merely means that the government collects an amount equal to the taxes which such person, in violation of the statute, had failed to pay over.

As reported in 442 F. 2d 1011, 1971, this court concluded that the evidence submitted on the first trial was such as would have permitted the jury to find that R. F. McCullough was a "person required to collect, truthfully account for, and pay over" the withholding and F.I.C.A. taxes. Upon remand the case was submitted to the jury, which found that until after the end of the last of the quarters involved, the taxpayer's father had sole and dominating control of the corporation and that the taxpayer had no responsibility for the collection or accounting for the taxes for the periods involved. The jury found, therefore, in favor of the taxpayer and judgment was entered accordingly.

The government here contends for a position which would, in effect, change the language of Section 6672 from "person required to collect, truthfully account for, and pay over" to "person required to collect, truthfully account for, *or* pay over." The government thus seeks to fix liability on R. F. McCullough because he was president of the corporation during a time when sufficient funds came into the corporation's coffers, which, in cumulative amount at least,

would have been sufficient to discharge the corporation's liability for the unpaid taxes. The principal difficulty with this argument is that this is not the way the statute is written and there is no statutory authorization for the collection of this penalty, even though the taxpayer had free funds available for the purpose of paying the taxes.

The government then constructs the theory that, nevertheless, the failure of the corporation to pay the withheld taxes constituted of them a trust fund under Section 7501 and it became the duty of any person who later had access to such funds to apply them for the purpose for which the trust was impliedly created. The initial factual difficulty with this approach in this case, however, is that it was clear from the evidence that the continued operation for approximately six months of the tenure of R. F. McCullough was at the will of a large factoring company which had security instruments covering substantially all the assets of the corporation and advanced funds for the operation only as itemized by specific voucher. Under these circumstances no unencumbered funds became available to the taxpayer out of which he could reinstate the so-called "trust fund," and then pay the same over to the government.

The court, on the state of this record, does not reach the legal question raised by the government in its "trust fund" theory. That is to say, we do not decide the liability of a person who becomes an officer responsible for the payment of withheld but not accounted for and not paid withholding and FICA taxes at a time when the corporation has funds from which the managing head of the corporation could discharge the defaulting corporation's trust obligation to the government and exercises his control to disburse such trust funds for other purposes. We hold

only that the government did not prove facts sufficient to establish the existence of such a fund at a time when R. F. McCullough was the managing official and thus, according to the government's contention, the "responsible person" for the payment thereof.

The judgment is

AFFIRMED.